



Signed: December 15, 2008


LESLIE TCHAIKOVSKY
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re

No. 08-43740 TG
Chapter 13

FELICIA LAURA COLLIER,

Debtor.

/

In re

No. 08-44842 TG
Chapter 13

WILLIE JACKSON,

Debtor.

/

NOTICE TO CALIFORNIA ATTORNEY GENERAL

Section 2403(b) of Title 28 of the United States Code provides that, when the constitutionality of a state statute is called into question in a proceeding in federal court, the court shall certify such fact to the attorney general of the State and shall permit the state to intervene. The Court has tentatively concluded that Cal. Rev. & Tax. Code § 4103(b) is unconstitutional as applied to bankruptcy debtors. Therefore, it hereby gives notice to the California Attorney General of this opinion and gives the California Attorney General 60 days from the date of this tentative decision to

1 indicate its desire to intervene. If not such indication has been
2 received within 60 days, the decision will become final.
3

4 **MEMORANDUM OF DECISION**
5

6 In each of the above-captioned chapter 13 cases, Donald R.
7 White, the Treasurer-Tax Collector of Alameda County, ("Alameda
8 County") objected to confirmation of the debtor's plan on the ground
9 that it failed to provide for payment of interest on its secured
10 property tax claim at the rate of 18% per annum pursuant to 11 U.S.C.
11 § 511(a) and Cal. Rev. & Tax. Code § 4103(b). The debtors contended,
12 among other things, that § 4103(b) is unconstitutional because it
13 violates the Supremacy Clause of the United States Constitution.
14 U.S. Const. Art. VI, § 8. The Court agrees. The reasons for the
15 Court's decision are set forth below. The memorandum also sets forth
16 the Court's conclusions with respect to Alameda County's alternative
17 arguments.

18 **SUMMARY OF FACTS**
19

20 Felicia Laura Collier ("Collier") filed a petition seeking
21 relief under chapter 13 of the Bankruptcy Code on July 17, 2008. On
22 August 28, 2008, she filed a first amended chapter 13 plan. The plan
23 sets forth a secured property tax claim owing to Alameda County in
24 the amount of \$15,000 and provides for an interest rate on the claim
25 of zero percent. Alameda County filed an objection to confirmation
26 on September 8, 2008. Alameda County filed a proof of claim on
October 31, 2008, listing the following amounts due:

(1) taxes and assessments totaling \$15,349.69;

(2) delinquent penalties totaling \$1,534.94 (calculated as 10% of the taxes);

(3) costs totaling \$30; and

(4) pre-petition redemption penalties through July 31, 2008 totaling \$2,379.29.

The proof of claim also asserted a claim for post-petition redemption penalties at the rate of 18% per annum.

Willie Jackson ("Jackson") filed a petition seeking relief under chapter 13 of the Bankruptcy Code on September 2, 2008. On November 8, 2008, he filed a third amended chapter 13 plan. The plan sets forth two secured property tax claims owing to Alameda County: i.e., one with respect to real property located on Martin Luther King Boulevard (the "MLK Boulevard Property") and one with respect to real property located on 38th Avenue (the "38th Avenue Property"). The Jackson Plan provides for an interest rate on both claims of 10% per annum.

Alameda County filed an objection to confirmation of the Jackson Plan on November 12, 2008. On November 4, 2008, it filed three proofs of claim in the Jackson case, one of which reflected property tax due for a third piece of real property located on Penniman Avenue

MLK Boulevard Property

(1) taxes and assessments totaling \$9,447.20;

(2) delinquent penalties totaling \$944.70 (calculated as 10% of the taxes);

(3) costs totaling \$20; and

(4) pre-petition redemption penalties through September 30, 2008 totaling \$1,272.81.¹

38th Avenue Property

(1) taxes and assessments totaling \$48,016.52;

(2) delinquent penalties totaling \$4,801.30 (calculated as 10% of the taxes);

(3) costs totaling \$70; and

(4) pre-petition redemption penalties through September 30, 2008 totaling \$15,622.06.

Penniman Avenue Property

(1) taxes and assessments totaling \$3,218.60;

(2) delinquent penalties totaling \$321.86 (calculated as 10% of the taxes);

(3) costs totaling \$20; and

(4) pre-petition redemption penalties through September 30, 2008 totaling \$96.26.

The proof of claim also asserted a claim for post-petition redemption penalties at the rate of 18% per annum.

DISCUSSION

A. SUMMARY OF THE ISSUES AND ARGUMENTS

When a chapter 13 plan proposes to pay the delinquent amount of a secured claim over time, 11 U.S.C. § 1325(a)(5)(B)(ii) requires the

¹Although § 4103(b) states that the 18% per annum charged should be considered interest when the taxpayer is a bankruptcy debtor, Alameda County's proofs of claim continue to refer to the charge as a penalty.

1 amount paid to equal the present value of the claim as of the
2 effective date of the plan. See 11 U.S.C. § 1325(a)(5)(B)(ii).
3 Normally, this requires that interest be paid on the claim at the
4 market rate. However, 11 U.S.C. § 511(a) provides that, when a
5 secured tax claim is involved, the rate of interest is determined by
6 applicable nonbankruptcy law.²

7 Section 4103(a) of the California Revenue and Taxation Code
8 ("Cal. Rev. & Tax. Code") provides that, when a real property owner
9 fails to pay its real property taxes when due, a redemption penalty
10 of 18% per annum accrues. However, Section 4103(b) provides that:

11 For purposes of an administrative hearing or any
12 claim in a bankruptcy proceeding pertaining to
13 the property being redeemed, the assessment of
14 penalties determined pursuant to subdivision (a)
constitutes the assessment of interest.

15 Cal. Rev. & Tax. Code § 4103(b).

16 Alameda County objected to the Collier and Jackson plans on the
17 ground that they fail to provide for payment of interest on its
18 claims at the rate of 18% per annum as required by 11 U.S.C. § 511.
19 Alternatively, Alameda County argued that, if the Court concludes
20 that the 18% per annum charge is not interest, the charge should be
21 considered part of the tax claim like the 10% delinquency penalty
22 that accrues when the tax is not paid when due. See Cal. Rev. & Tax

23
24 ²Section 511(a) of the Bankruptcy Code states as follows: "If
any provision of this title requires the payment of interest on a
tax claim or on an administrative expense tax, or the payment of
interest to enable a creditor to receive the present value of the
allowed amount of a tax claim, the rate of interest shall be the
rate determined under applicable nonbankruptcy law." 11 U.S.C. §
511(a).

1 Code §§ 2617 & 2618; Rickley v. County of Los Angeles, 114 Cal. App.
2 4th 1002, 1011 (2004). Finally, Alameda County asserted that the
3 post-petition penalties may be recovered as part of its secured claim
4 based on 11 U.S.C. § 506(b).

5 The debtors' only meaningful argument challenging the County's
6 position is that Cal. Rev. & Tax. Code § 4103(b) is unconstitutional
7 as in violation of the United States Constitution and that it is
8 preempted by the Bankruptcy Code. They do not address Alameda
9 County's two alternative contentions.

10 All three issues are addressed below.

11 **B. DECISION**

12 **1. Is Cal. Rev. & Tax Code § 4103(b) Preempted by the
13 Supremacy Clause?**

14 The first issue to be addressed is whether Cal. Rev. & Tax. Code
15 § 4103(b), as applied to a debtor in a bankruptcy case, is preempted
16 by the Bankruptcy Code. The Court concludes that it is. Thus, §
17 4103(b) is a nullity as applied to Collier and Jackson. The basis
18 for the Court's decision is set forth below.

19 Section 511(a) of the Bankruptcy Code provides that, in a
20 chapter 13 case, when a tax claim is to be paid over the life of the
21 plan, the tax claim must receive interest at the rate provided by
22 state law. Section 4103(b) of the California Revenue and Taxation
23 Code states that, when the taxpayer is in bankruptcy, the 18% per
24 annum charge assessed on delinquent property taxes shall be deemed
25 interest.

1 The question is whether Congress's intent in enacting § 511(a)
2 was to permit states to enact a bankruptcy specific interest rate or
3 merely to subject bankruptcy debtors to the same interest rate
4 imposed on nonbankruptcy debtors under state law. The Court
5 concludes that Congress intended the latter, not the former. As a
6 result, it concludes that § 4103(b) violates the Supremacy Clause of
7 the United States Constitution and is a nullity as applied to
8 bankruptcy debtors.³

9 The Supreme Court has described the doctrine of federal
10 preemption as follows:

11 The pre-emption doctrine, which has its roots in
12 the Supremacy Clause, U.S. Const., art. VI. cl.
13 2, requires us to examine congressional intent.
14 Pre-emption may be either express or implied,
15 and "is compelled whether Congress' command is
16 explicitly stated in the statute's language or
17 implicitly contained in its structure and
18 purpose." Absent explicit pre-emptive language,
19 Congress' intent to supersede state law
20 altogether may be inferred because "[t]he scheme
21 of federal regulation may be so pervasive as to
22 make reasonable the inference that Congress left
23 no room for the States to supplement it,"
24 because "the Act of Congress may touch a field
25 in which the federal interest is so dominant
26 that the federal system will be assumed to
27 preclude enforcement of state laws on the same
28 subject," or because "the object sought to be
29 obtained by federal law and the character of the
30 obligations imposed by it may reveal the same
31 purpose."

30 Section 4103(b) also applies to taxpayers not in bankruptcy
31 who are the subjects of an administrative proceeding. The Court
32 does not view the inclusion of these nondebtors in this subsection
33 as sufficient to render the provision constitutional as applied to
34 bankruptcy debtors.

1 MSR Exploration, Ltd. v. Meridian Oil, Inc., 74 F.3d 910, 913 (9th
2 Cir. 1996), quoting from Fidelity Fed. Sav. & Loan Ass'n v. de la
3 Cuesta, 458 U.S. 141, 152-53 (1982). The MSR Exploration court
4 stated that:

5 ...a mere browse through the complex,
6 detailed, and comprehensive provisions of the
7 lengthy Bankruptcy Code...demonstrates
8 Congress's intent to create a whole system under
9 federal control which is designed to bring
10 together and adjust all of the rights and duties
11 of creditors and embarrassed debtors alike.

12 Id. at 914.

13 However, as stated in Sherwood Partners, Inc. V. Lycos, Inc.:

14 At the same time, federal law coexists peaceably
15 with, and often expressly incorporates, state
16 laws regulating the rights and obligations of
17 debtors...and creditors. In determining
18 whether...[a specific state statute] is
19 preempted, we must consider whether it is merely
20 another creditor rights provision of the kind
21 that is tolerated by the Bankruptcy Code, or
22 whether it gives the state...powers that are
23 within the heartland of bankruptcy
24 administration."

25 394 F.3d 1198, 1201 (9th Cir. 2005).

26 In Sherwood Partners, the Ninth Circuit concluded that Cal. Civ.
27 Proc. Code § 1800, which gives an assignee for the benefit of
28 creditors the power to recover a preferential transfer, was preempted
29 by the Bankruptcy Code. Sherwood Partners, the assignee, contended
30 that § 1800 was not only tolerated by the Bankruptcy Code but
31 specifically incorporated through 11 U.S.C. § 544(b). Section 544(b)
32 permits a trustee to avoid a transfer that could be avoided by
33 unsecured creditors under state law. The Sherwood Partners court
34 found this argument unpersuasive, noting that § 1800 did not give the

1 power to recover preferences to creditors in general, only to an
2 assignee for the benefit of creditors. Thus, it did not come within
3 the provisions of 11 U.S.C. § 544(b). Id. at 1201-02.

4 The Sherwood Partners court then addressed the question of
5 whether, although not expressly incorporated by the Bankruptcy Code,
6 § 1800 could peaceably coexist with it. Id. at 1202. The court
7 concluded that it could not. It observed that one of the major goals
8 of bankruptcy was the equitable distribution of the debtor's
9 nonexempt assets and that the power to avoid preferences was one of
10 the major powers in accomplishing that goal. If an assignee for the
11 benefit of creditors could recover a preference, it would prevent a
12 bankruptcy trustee from doing so since a preference may only be
13 recovered once. Id.

14 Similarly, in a case decided under the Bankruptcy Act, the Ninth
15 Circuit found unconstitutional a California statute purporting to
16 exempt a personal injury action from the claimant's bankruptcy
17 estate. See In re Kanter, 505 F.2d 228, 230-31 (9th Cir. 1974). At
18 that time, a debtor's bankruptcy exemptions were those exemptions
19 provided to judgment debtors in general under state law. However,
20 the California statute in question purported to render a personal
21 injury action exempt from a bankruptcy trustee but not with respect
22 to judgment creditors outside a bankruptcy case. The Kanter court
23 concluded that, by giving states the power to define a debtor's
24 exempt property, Congress did not intend to give states "a free hand
25 to circumscribe the powers of the bankruptcy trustee." Id. at 230.
26

1 Finally, a number of cases, many in recent years, have addressed
2 the constitutionality of exemption schemes enacted by states which
3 are applicable only to bankruptcy debtors.⁴ The decisions on whether
4 such schemes are constitutional are split. See In re Morrell, 394
5 B.R. 405, 414, n. 5 (Bankr. N.D. W.Va. 2008)(citing cases on issue).
6

7 Having considered the issue and the authorities cited above, in
8 particular, Kanter, the Court concludes that Cal. Rev. & Tax. Code §
9 4103(b) is preempted by the Bankruptcy Code and may not be applied to
10 a bankruptcy debtor. Congress' intent in enacting 11 U.S.C. § 511(a)
11 was clearly to prevent any distinction made between bankruptcy and
12 nonbankruptcy debtors with respect to the interest rate imposed on
13 delinquent tax claims. The thrust of § 4103(b) is directly opposed
14 to that intent: i.e., it creates a distinction between the two types
15 of taxpayers.

16 **2. Is Delinquent Penalty Part of the Tax?**

17 Alameda County's second contention was that, even if the 18%
18 annum charge (i.e., the redemption penalty) is a penalty, not
19 interest, it is part of the tax as is the 10% delinquent penalty. As
20 noted above, in support of this contention, Alameda County cited
21 Rickley and the cases cited therein.

22 In Rickley, a real property owner wished to contest the
23 legitimacy of the property tax. Applicable law required the "tax" to
24 be paid in order to challenge the legitimacy of the tax. 114 Cal.

25 ⁴See In re Lennen, 71 B.R. 80, 81-82 (Bankr. N.D. Cal. 1987)
26 for an accurate description of the reason for the enactment of
these state law exemptions schemes.

1 App. 4th at 1010; see Cal. Const. Art. XIII, § 32. The property owner
2 had paid the principal amount of the tax but not the delinquent or
3 redemption penalties. The issue was whether the penalties were part
4 of the "tax" that had to be paid to challenge the legitimacy of the
5 tax. Id. at 1009-10.

6 The Rickley court held that both types of penalties had to be
7 paid. It noted that §§ 2617 and 2618 state that, if the two
8 installments of property tax are not paid by the deadline, the
9 delinquent penalty "attaches" to the tax. Id. at 1011. Section
10 4103(a) also uses the word "attach" with respect to redemption
11 penalties. See Cal. Rev. & Tax. Code §§ 2618 & 4103. However, the
12 debtors do not dispute that the delinquent penalties or pre-petition
13 redemption penalties are part of the tax that they owe to Alameda
14 County. They merely dispute that the redemption penalties continue
15 to accrue post-petition.

16 The debtors cite no authority for their contention that
17 redemption penalties on unpaid real property tax do not accrue post-
18 petition. The Court is unaware of any such authority. Section
19 502(b)(2) of the Bankruptcy Code provides that claims for post-
20 petition interest may be disallowed. There is no comparable
21 provision for post-petition penalties. Thus, the Court concludes
22 that the redemption penalties provided for by § 4103(a) do continue
23 to accrue post-petition until the plan has been fully performed and
24 the debtor has received a discharge.

25 The more significant question is what payment on the claim must
26 be made by the debtors. The answer to this question depends on

1 whether or not the redemption penalties are part of Alameda County's
2 secured claim. This issue is addressed in the next section.
3

4 **3. Are Redemption Penalties Allowable as Part of Alameda
County's Secured Claim Allowable Pursuant to 11 U.S.C. §
506(b)?**

5 Alameda County contended that the post-petition redemption
6 penalties may be recovered as part of its secured claim pursuant to
7 11 U.S.C. § 506(b). Section 506(b) states as follows:

8 To the extent that an allowed secured claim is
9 secured by property the value of which, after
any recovery under subsection (c) of this
10 section, is greater than the amount of such
claim, there shall be allowed to the holder of
11 such claim, interest on such claim, and any
reasonable fees, costs or charges provided for
12 under the agreement or State statute under which
such claim arose.

13 11 U.S.C. § 506(b). The Court finds this contention without merit.
14 The Court bases this conclusion on In re County of Orange, 262 F.3d
15 1014 (9th Cir. 2001) ("Orange County").

16 In Orange County, the Federal Deposit Insurance Corporation (the
17 "FDIC"), as receiver for various failed financial institutions, filed
18 proofs of claim for delinquent real property tax penalties paid under
19 protest. It contended that 12 U.S.C. § 1852(b) shielded it from
20 liability for the delinquent penalties, both those that accrued
21 before it took over as receiver and those that accrued thereafter.
22 Section 1852(b)(2) and (3) state that:

23 When acting as a receiver...

24 (2) No property of the...[FDIC] shall be subject to
levy, attachment, garnishment, foreclosure, or sale
25 without the consent of the ...[FDIC], nor shall any
involuntary lien attach to the property of
the...[FDIC].

26 (3) The...[FDIC] shall not be liable for any amounts

1 in the nature of penalties or fines, including those
2 arising from the failure of any person to pay any real
3 property, personal property, probate, or recording tax
 or any recording or filing fees when due."

⁴ 12 U.S.C. § 1852(b)(2), (3).

5 The Ninth Circuit held that the FDIC took the real property in
6 question subject to the encumbrances for the delinquent penalties
7 that had accrued before it became receiver for the institution in
8 question. However, it held that the FDIC was entitled to
9 reimbursement for the redemption penalties paid, both those that
10 accrued before and those that accrued after it became receiver
11 because these redemption penalties did not constitute part of the
12 lien on the real property. Orange County, 262 F.3d at 1018. It
13 based this holding on Weston Inv. Co. v. California, 31 Cal. 2d 390
14 (1948), in which the California Supreme Court held that redemption
15 penalties do not become "part of the tax obligation to be secured by
16 the lien." Id. at 1021-22; see also Ferreira v. El Dorado County,
17 222 Cal. App. 3d 788 (1990).

18 As a result, although the Court concludes that Alameda County's
19 redemption penalties continue to accrue post-petition, it concludes
20 that they constitute a general, unsecured claim as do the redemption
21 penalties that accrued pre-petition. As such, Alameda County is
22 entitled to receive its pro rata share of any payments made by the
23 debtors to general, unsecured creditors on account of these
24 redemption penalties. Since there is no exception to discharge in
25 chapter 13 with respect to such claims, see 11 U.S.C. § 1328, if the

1 plans are fully performed, the debtors will receive a discharge with
2 respect to any remaining balance of these penalties.
3

4 **CONCLUSION**

5 Section 4103(b) of the California Revenue and Taxation Code is
6 preempted by the Bankruptcy Code and is a nullity as applied to a
7 debtor in a bankruptcy case. Although Alameda County is entitled to
8 interest on its secured claim, including both the underlying tax
9 itself, plus costs and the delinquent penalty, it is not entitled to
10 interest at 18% per annum absent evidence. The statutory rate should
11 apply.

12 The debtor is thus subject to § 4103(a) which provides for a
13 delinquent penalty on any unpaid property tax at the rate of 18% per
14 annum. The penalty continues to accrue post-petition. However, it
15 is not part of Alameda County's secured claim and is entitled to
16 receive only its pro rata share of any amounts paid to the general,
17 unsecured creditors.

18 END OF DOCUMENT

COURT SERVICE LIST

Office of the Attorney General
1300 "I" St.
P.O. Box 944255
Sacramento, CA 94244-2550

Claude F. Kolm
Deputy County Counsel
Office of County Counsel, County of Alameda
1221 Oak St., Ste. 450
Oakland, CA 94612

Max Cline
Law Offices of Max Cline
1300 Clay St.
Oakland, CA 94612

David Ashley Smyth
Smyth Law Offices
1990 N California Blvd. #830
Walnut Creek, CA 94596

Martha G. Bronitsky
P.O. Box 5004
Hayward, CA 94540-5004